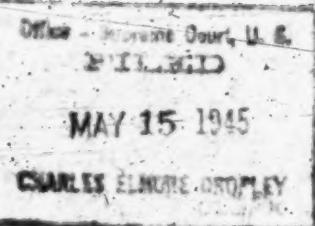


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In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN,
AND W. ALEXANDER JULIAN, TREASURER OF THE
UNITED STATES, PETITIONERS

v.

HARTWELL CABELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT



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The Solicitor General, on behalf of the Alien Property Custodian and the Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Neither the opinion of the district court (R. 15) nor the opinion of the circuit court of appeals (R. 26) has yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 2, 1945 (R. 31). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 9 of the Trading with the Enemy Act, as originally enacted, authorized a creditor of the former owner of enemy property seized by the Alien Property Custodian to bring suit against the Custodian upon the debt. Section 9 (e) of the Act, as amended, provides that no debt shall be allowed "under this section unless it was owing to and owned by the claimant prior to October 6, 1917" and claimed by application filed "prior to the date of the enactment of the Settlement of War Claims Act of 1928." Section 5 (b) of the Act, as amended by the First War Powers Act, 1941, provides that the President or his authorized agent may vest the property of any foreign country or national thereof and that such property may be "used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States".

The question is whether the Act, as amended, permits a creditor of the former owner of property vested during the present war to bring suit against the Custodian despite the temporal limitations of Section 9 (e) and the broad authority granted by the First War Powers Act.

STATUTES INVOLVED

The pertinent provisions of Sections 5 and 9 of the Trading with the Enemy Act, as amended, are set forth in the Appendix.

STATEMENT

This suit was initiated on June 29, 1944, in the United States District Court for the Southern District of New York under the Trading with the Enemy Act, as amended, for the recovery from the Alien Property Custodian¹ of money claimed to be owed to the plaintiff by an Italian insurance company, of which the assets in this country had been vested by the Custodian. The amended complaint, filed on September 13, 1944, alleged the following facts:

In 1935, the Assicurazioni Generali di Trieste e Venezia, an Italian insurance company, established a branch in the City of New York (R. 3). This branch, known as the General Insurance Company of Trieste and Venice, continued to operate here until July 25, 1941, when it was taken over by the New York Superintendent of Insurance in liquidation proceedings (R. 3-5).

¹ The plaintiff also named the Treasurer of the United States as a defendant, apparently relying upon that portion of Section 9 (a) of the Trading with the Enemy Act which provides: " * * * to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant."

Prior to the liquidation, the plaintiff had performed legal services both for the Italian company and its United States branch. He filed with the Superintendent of Insurance a claim for about \$22,000, constituting fees and disbursements which had been approved but not paid by Assicurazioni (R. 2-6). The Superintendent allowed and paid all but \$7,000 which he concluded was a debt due from the Italian company rather than its United States branch (R. 6). The disallowance of \$7,000 was upheld by the New York Court of Appeals in February, 1944 (R. 6-7).

In 1942, the Alien Property Custodian issued orders vesting in himself for the benefit of the United States all properties in this country of the Italian company, including all of the properties of the United States branch, except so much of a reserve fund as would be necessary to pay "(1) claims of domestic creditors of such United States branch of said corporation which had been allowed and approved but not paid by said liquidator, (2) claims of domestic creditors of such United States branch of said corporation which are being held in suspense by said liquidator, and (3) liquidation expenses of said liquidator * * *." Vesting Order 218, October 7, 1942, 7 F. R. 9466; Vesting Order 468, December 9, 1942, 8 F. R. 1038. The vested assets were delivered to the Custodian.

The plaintiff filed his claim^{*} with the Custodian, but was not paid.

On motion of the defendants the district court dismissed the complaint, holding that the debt claim provisions of Section 9 (a) of the Trading with the Enemy Act, as amended, were deprived of general applicability by the amendments embodied in Section 9 (e); and that in view of the operative dates explicitly set forth in Section 9 (e), Congressional action is necessary to afford a remedy to creditors of property vested during the present war (R. 15-19). The circuit court of appeals, in an opinion by Judge Learned Hand, reversed the judgment, holding that the general language of Section 9 (a) has a continuing vitality, apart from the limitations of Section 9 (e); and that the disqualifying dates introduced by Section 9 (e) apply only to property seized during the last war (R. 26-30).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS.

Section 9 of the Trading with the Enemy Act as originally enacted on October 6, 1917, provided without qualification that "any person, not an enemy, or ally of enemy * * * to whom any debt may be owing from an enemy, or ally of

* Revising a previous estimate of disbursements, the plaintiff now claims \$6,922.02 and interest.

enemy, whose property . . . shall have been conveyed, transferred . . . delivered, or paid to the alien property custodian" might recover upon his debt in a suit against the Custodian. 40 Stat. 419. By the Act of June 5, 1920, Section 9 was divided into several subsections. The general authority to institute suit upon debt claims was retained, in Section 9 (a). But Section 9 (e), which was added to the statute at the same time, provided: "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917." 41 Stat. 977. In 1928, Section 9 (e) was further amended by the addition of a provision that no debt shall "be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." 45 Stat. 271.

We think the language of Section 9 (e) plainly precludes an interpretation limiting its scope to claims against former owners of property seized during the last war. Assuming that Section 9 was originally designed, as its words suggest, to provide a remedy for creditors which, like the remedy of the owner of property mistakenly seized, would arise whenever the Act should be operative in time of war, that purpose was altered by the amendments embodied in Section 9 (e), and the alteration continues to be effective in the

absence of further action by Congress. The prohibition of Section 9 (e) applies, by its terms, "in any event"; it was not limited, as it easily might have been, and as other sections of the Act were, to situations growing out of the last war. The fact that Congress failed on the two separate occasions when Section 9 (e) was the subject of legislative consideration to limit its future applicability in express terms suffices, in our view, to make clear that no such limitation was intended. It is true that the limiting language of Section 9 (e) was adopted with reference to property vested during the last war. But the conclusion is nevertheless inescapable that the device employed by Congress to effectuate that limitation operated by its terms to deprive the general language of Section 9 (a) of the continuing vitality it would otherwise have had. In our view, there can be no difference in effect because Congress, in accordance with the general procedure it adopted at the time, added the disqualifying dates in a separate subdivision instead of incorporating them into Section 9 (a) itself.

That Congress should have been satisfied to destroy the continuing vitality of the debt claim provisions of the Act is not implausible as the Court below assumed. Unsecured creditors of property seized by the United States have no

* See, e. g., Section 3 (d) of the original Act: "Whenever, during the present war * * *" 40 Stat. 413.

constitutional right to compensation. *Kogler v. Miller*, 288 Fed. 806 (C. C. A. 3). See *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 497; *Banco Mexicano v. Deutsche Bank*, 289 Fed. 924, 928 (App. D. C.), affirmed, 263 U. S. 591; *Sutherland v. Norris*, 24 F. 2d 414, 415 (C. C. A. 3), certiorari denied, 277 U. S. 602; *Synthetic Patents Co. v. Sutherland*, 22 F. 2d 491, 494 (C. C. A. 2), certiorari denied, 276 U. S. 630. While their claims are, of course, entitled to respect, the extent to which and the manner in which they should be allowed necessarily pose problems of legislative policy which may be expected to vary from time to time. Not merely the claims of creditors of persons whose property has been vested are involved but also the claims of American owners of property abroad and the more general problem of reparations. It is entirely understandable, therefore, that if Congress at the close of the last war took cognizance at all of the possibility of another conflict, it should have concluded that the question of debt claims as it relates to vested property was one to be faced as the occasion might arise.

Assuming for the purpose of argument that the language of Section 9 (e) is ambiguous enough to permit the interpretation of the court below, we submit that the considerations which should dominate in the process of construction argue convincingly against such an interpretation. If effi-

cient administration of alien property controls in accordance with policies laid down by Congress is given due weight in resolving possible ambiguities, we believe that any construction of Section 9 (e) denying its present effectiveness must be discarded.

By virtue of amendments to Section 5 (b) of the Trading with the Enemy Act, added by the Joint Resolution of May 7, 1940, and by the First War Powers Act, 1941, the executive branch of the Government is now armed with much more comprehensive powers over alien property than were granted by the Act as it had developed during the First World War. Among other things, Section 5 (b), as amended, authorizes the President "through any agency that he may designate" to "regulate, * * * prevent or prohibit, any * * * transactions involving, any property in which any foreign country or a national thereof has any interest." It also provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."

In accordance with these two major grants of power, the administration of the Trading with the Enemy Act during the present war has had two major aspects: the regulation of foreign funds, primarily administered by the Treasury Department; and the vesting of alien property, primarily administered by the Office of Alien Property Custodian. See Executive Order 8389, 5 F. R. 1400, 6 F. R. 2897; Executive Order 9193, 7 F. R. 5205.

The regulatory program was initiated immediately after the invasion by the Axis Powers of Denmark and Norway and soon thereafter was given explicit Congressional ratification in the Joint Resolution of May 7, 1940. 54 Stat. 179. Essentially, this program, commonly referred to as the "freezing" or "blocking" of foreign funds, has been aimed at the immobilization of foreign assets in the United States by prohibiting any transactions involving them, unless licensed.

Vesting, on the other hand, was not begun until after Pearl Harbor. The essence of the vesting program is the taking over by the United States of the complete proprietary interest in alien property, thereby making it available without restriction for any affirmative use deemed to be in the national interest.

Regulated alien funds in the United States, consisting principally of cash, securities, and other liquid assets, amount in the aggregate to ap-

proximately \$8,000,000,000; * vested property, consisting principally of business enterprises, patents, trade-marks and copyrights, real and personal property, ships, and property in the process of judicial administration, amounts to approximately \$125,000,000.⁵ In the case of frozen funds, overwhelmingly greater in value than vested property, although ownership by the foreign country or national is not disturbed, the property is not available for the payment of debts contracted for by the owners, except at the discretion of the Treasury Department. If the Treasury refuses to grant a license permitting payment of creditors out of blocked funds, it is beyond dispute that neither the creditor nor the owner has any remedy as a matter of right under the Act. The Office of Alien Property Custodian has operated upon the assumption that creditors of former owners of vested property are in no better position than creditors of owners of blocked assets; that although the Custodian, like the Secretary of the Treasury, has discretionary power to pay creditors in appropriate cases by virtue of his authority under Section 5 (b) to "administer," "liquidate," or "otherwise deal with" vested prop-

* See *Hearings on H. R. 4840*, 78th Cong., 2d Sess. (1944), 104-106.

⁵ See Annual Report of the Office of Alien Property Custodian (1943), 3. The estimate does not include the value of property vested after June 30, 1943, nor of any vested patents, trade-marks and copyrights.

erty in the interest of the United States, he cannot as a matter of law be required to pay debts of former owners of vested property until Congress makes specific provision for their payment by legislative action addressed to the circumstances of the present war.

The decision below destroys consistency in the position of creditors under the Trading with the Enemy Act. It would permit creditors of certain aliens whose property has been vested to maintain suit for recovery of their debt claims, although the debtor no longer owns the property and although typically the property is in active wartime use. At the same time, creditors of aliens whose funds are merely frozen have no compulsory means of exacting payment of debt claims, although the frozen property continues to be owned by their debtors and although it is typically intangible and not now serving any actual productive purpose.

Among creditors of former owners of vested property a further distinction, also without apparent economic justification, would result. If Section 9 (e) were erased by judicial construction in accordance with the decision below, Section 9 (a) would stand without qualification. By its terms, Section 9 (a) permits suits on debt claims only if the debt is one "owing from an enemy or ally of enemy" whose property has been taken. In this war, however, the vesting power has not

been limited to the property of "an enemy or ally of enemy"; by the First War Powers Act, 1941, it has been extended to the property of "any foreign country or national thereof." If the former owner of vested property is a non-enemy foreign national, there is nothing in the Act, even as construed by the court below, which authorizes suit against the Custodian by the former owner's creditors. Yet, in the case of property formerly owned by an enemy, where the considerations justifying unrestricted use by the United States are multiplied, the decision below would permit the operations of the Custodian to be burdened by creditors' lawsuits.

Besides resulting in anomalous distinctions among creditors, the decision below would affirmatively encourage creditors who fall within the scope of Section 9 (a) to bring suit immediately. For the judicial decisions in cases growing out of the First World War make it clear that the debt claim provisions of Section 9 (a), taken by themselves, do not establish any equitably ordered priority in the payment of debts out of seized property. The controlling principle is "first come, first served". *United States v. Securities Corporation General*, 4 F. 2d 619 (App. D. C.), affirmed *sub nom. White v. Mechanics Securities Corp.*, 269 U. S. 283. Hence, the deletion of Section 9 (e) in accordance with the decision below would start a race of diligence to bring suit on

debt claims. At the least, this would result both in disorderly administration of vested property and inevitable inequities among creditors. Beyond that, it would either impair or terminate entirely the utilization in the war effort of valuable economic resources within the United States.

Applied to the present administration of alien property controls, Section 9 (a), without the limitations of Section 9 (e), would make distinctions among creditors on grounds that have no contemporary significance; would burden the operations of the Office of Alien Property Custodian; would encumber or prevent the use of vested property for war purposes; and would produce inequities among the class of creditors permitted to sue. It is plain that Congress anticipated no such results when it amended the Trading with the Enemy Act in 1940 and again in 1941. The statutory history of the First War Powers Act, 1941, abundantly establishes that Congress deliberately granted the power to vest property "of any foreign country or national thereof" in order to assure that such property would be available for any affirmative use that the national interest in time of war might require.¹ Survival of the privilege of satisfying debt claims as a matter of right out of vested property is

* See, e. g., Senate Report No. 911, 77th Cong., 1st Sess. (1941), 2; House Report No. 1507, 77th Cong., 1st Sess. (1941), 2-3; remarks of Mr. Hancock, 87 Cong. Rec. 9861.

clearly inconsistent with such an objective. And the explicit grant in Section 5 (b), as amended, of a discretionary power to "administer" or "liquidate" vested property—terms connoting an ordering of creditors' claims on equitable principles—cannot be reconciled with the mandatory "first come, first served" scheme which the cancellation of Section 9 (e) would bring into play.

The inescapable conclusion is that Congress acted upon the assumption that the creditors' remedy provided in Section 9 (a) had been withdrawn by Section 9 (e). We submit that any doubts in the construction of Section 9 (e) should be resolved to support rather than defeat the unmistakably indicated policies of Congress.

2. THE ISSUES ARE OF NATIONAL IMPORTANCE

Since the outbreak of the present war, more than 2000 creditors of former owners of vested property have filed claims with the Alien Property Custodian in an aggregate amount of approximately \$100,000,000.¹ Nevertheless, the number of court actions filed against the Custodian on debt claims has been negligible.² We believe that this is attributable to the general prevalence of

¹ See *Hearings on H. R. 4840*, 78th Cong., 2d Sess. (1944), 12.

² From the outbreak of the present war until the filing of the decision below, the following actions (in addition to the instant case) on unsecured debt claims were initiated: *Yasui v. Crowley*, Civil Action Nos. 21-451, 21-452, 21-453, S. D. N. Y. (actions voluntarily dismissed, January, 1944);

the view that the Trading with the Enemy Act, as amended, does not authorize such suits.¹⁰ If the decision below should stand unchanged, a great volume of litigation will inevitably confront the Custodian in the near future.¹¹

The decision below resolves judicially questions of war and postwar policy on which Congress has not yet acted. Although the First War Powers Act, 1941, enlarges the affirmative powers of the

Hayden v. Crowley, Civil File No. 811, W. D. Wash (complaint dismissed on other grounds, upon defendant's motion; May, 1944; affirmed on reconsideration, July, 1944); *Hayden v. Crowley*, Civil File No. 852, W. D. Wash. (filed, December, 1943; hearing date not yet requested by plaintiff); *Roegelein v. Markham*, Civil Action No. 635, W. D. Texas (filed, January, 1945).

¹⁰ During the second session of the Seventy-Eighth Congress, a subcommittee of the House Judiciary Committee held extensive hearings upon H. R. 4840 (later amended and reintroduced as H. R. 5031), a bill to amend the First War Powers Act, 1941. See *Hearings on H. R. 4840, 78th Cong., 2d Sess.* (1944). The session expired before final action was taken. The bill specified a detailed procedure for equitable disposition of creditors' claims, but payment was "permissive rather than mandatory on the Custodian." *Hearings*, 115. The hearings reveal unanimous understanding that under presently existing law, creditors cannot proceed against the Custodian as a matter of right. See, e. g., Statement on Behalf of Special Committee on Custody and Management of Alien Property, American Bar Association, *Hearings*, 38, 55.

¹¹ See, e. g., *Stasi v. Markham*, Civil Action No. 5196, D. N. J. (filed, April, 1945) in which the plaintiff, who since December, 1942, had held a judgment against the former owner of vested property without bringing suit upon it, initiated action to recover upon his claim a few days after the decision below was rendered.

executive branch in dealing with alien property under Section 5 (b) of the Trading with the Enemy Act, it refers only indirectly and incidentally to the problem of debt claimants. We believe, moreover, that the First War Powers Act reveals a Congressional understanding that, for the present, debt claimants cannot proceed against the Custodian as a matter of right. The operations of the Office of Alien Property Custodian have proceeded on the assumption that Congress has deliberately postponed comprehensive consideration of this problem until problems of war settlement and international relations with which it is fundamentally connected can be appropriately dealt with at the same time.

Since the court below has not only resolved a complicated question of national policy without the benefit of positive direction from Congress, but has resolved it in a manner which would basically reshape the operations of the Office of Alien Property Custodian, the correctness of its decision should be reviewed by this Court.

CONCLUSION

The circuit court of appeals has erroneously decided an important question of federal law which has not been but should be settled by this Court. It is therefore respectfully submitted that this petition should be granted.

HUGH B. COX,
Acting Solicitor General.

MAY 1945.

APPENDIX

"Trading with the Enemy Act, c. 106, 40 Stat. 411; as amended, 50 U. S. C. App. 1-31:

Sec. 5 [as amended by the First War Powers Act, 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. III, 616]:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the

terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

Sec. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any per-

son from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be en-

tered against the claimant or suit otherwise terminated.

Sec. 9 (e). No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States * * * nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.